

Memorandum

May 12, 1998

Page 2

"interstate" traffic. This causes a problem when competing providers use different methods. A responsible provider might reflect higher interstate usage than a provider seeking to minimize contributions. Or, a provider operating in markets with differing interstate usage might use a company-wide average for all markets, which would disadvantage competitors in the markets with high interstate usage.

In order to address this confusion, one of several reasonable methodologies could be applied uniformly by CMRS providers. This situation presents two questions:

1. May the Commission require CMRS providers to use a specified methodology without further "notice and comment" proceedings?
2. If so, may the Commission apply the more specific requirement to Forms 457 (the USF estimated contribution forms) that have already been filed?

The answer to both questions is "yes."

2. Clarifying The Application Of Form 457 To CMRS Providers Would Be An Interpretive Rule, Exempt From Notice-And-Comment Requirements.

Under the *August 15 Order*, a contributor's interstate revenue figure must be derived directly from the contributor's books or estimated using a methodology that will produce "reasonably accurate" results. This substantive rule would not change by virtue of the Commission providing guidance to the CMRS industry about how to make such estimates. As a result, such guidance would be an interpretive rule — expressly exempt from "notice and comment" requirements.²

The language used to establish the current requirement supports this view. A contributor's methodology must be one that it "in good faith, believe[s] will yield a *reasonably accurate result*." Existing telecommunications firms such as CMRS providers — which operate under unique market characteristics not shared by landline telephone

² The line between an "interpretive" rule and a "substantive" rule is not always clear. The basic idea, however, is that interpretive rules resolve ambiguity in, clarify, or explain an existing rule, but do not change policy. As one court put it, "interpretive rules merely clarify or explain existing law or regulations" and "go to what the administrative officer thinks the statute or regulation means." *August 15 Order* at ¶ 15 n.29, citing *Southern California Edison Co. v. FERC*, 770 F.2d 779, 783 (9th Cir. 1985).

Memorandum

May 12, 1998

Page 3

companies — could fairly be held to a different standard of "reasonable accuracy" than other potential USF contributors, without changing the basic rule.³

It bears emphasis here that the only matter at issue would be clarification of an *estimation* methodology. It is hard to see how clarifying the application of a vaguely stated "good faith/reasonable accuracy" rule for making an estimate could constitute a new "substantive" rule.

3. The Commission May Require Previously-Filed Forms To Be Corrected In Light Of Subsequent Administrative Guidance.

Form 457 on its face contemplates revisions if data need to be corrected. As the Common Carrier Bureau noted in its most recent clarifications of the Form 457 requirements, "a contributor must file a revised Worksheet if it discovers an error in the data that it reports."⁴ This clearly indicates that previously-filed Forms 457 are to be re-submitted with correct information.

Certain features of the *August 15 Order* also show that subsequent adjustments are contemplated. That order required contributors that base their interstate revenue figures on estimates to "document how they calculated their estimates and make such information available to the Commission or Administrator upon request."⁵ Moreover, the new Form 457 instructions refer to the possibility of an audit of a Form 457.⁶ Audits would be pointless if corrections based on the audit were not possible.

³ The Commission could conclude that, for a CMRS provider to have a "good faith belief" that a particular estimation method will produce a "reasonably accurate result," the CMRS provider must follow certain basic steps that the Commission itself may specify. The Commission also could establish interim estimates, or proxies, until those basic steps are developed and adopted.

⁴ See Public Notice, DA 98-329, "Division Announces Release of Revised Universal Service Worksheet, FCC Form 457, CC Docket Nos. 97-21, 96-45" (March 4, 1998) at 11 ("Public Notice").

⁵ *August 15 Order* at ¶ 21. This requirement contemplates that an "estimate" may be subject to later revision if it turns out to be wrong based upon review of the underlying data. Similarly, on page 17 of its revised instructions for Form 457, the Bureau directs that "[a]ll information supporting special studies must be made available to either the FCC or to the Universal Service Administrator upon request."

⁶ *Public Notice* at 11.

Memorandum

May 12, 1998

Page 4

Moreover, in the *August 15 Order*, the Commission stated that the approach it was setting out was an "interim" one. The Commission has indicated in other contexts that designating a mechanism as "interim" — which it plainly did with the "good faith estimate/reasonable accuracy" rule — "put[s] carriers on notice" that adjustments may be made that relate back to filings under the "interim" regime.⁷

In these circumstances, CMRS providers cannot reasonably expect that — no matter what figures they may have included in the Form 457 regarding interstate revenues based on the "interim" approach — they would never have to file a revised form that corrects information relating to the period for which the revision was necessary. It follows that an interpretive rule clarifying the revenue estimation methodology to be used by CMRS providers can be applied to already-filed Forms 457.

4. The Common Carrier Bureau May Take The Requisite Actions.

Finally, as an administrative matter, the Common Carrier Bureau, rather than to the Commission itself, could issue the required clarification. Section 0.91 of the Commission's rules broadly defines the scope of the functions of the Bureau, and Section 0.291 delegates the performance of all of those functions the Bureau Chief, subject to various exemptions not relevant in the case of interpretive rules.⁸

In fact, in issuing and then revising instructions for filling out Form 457 without engaging in any notice-and-comment process, the Bureau has already engaged in "interpretive rulemaking" regarding USF contributions. If the Bureau, rather than the Commission, may provide instructions and guidance of the type included in its most recent revisions of the Form 457 instructions, then it can issue an interpretive rule regarding the appropriate estimation of "interstate" revenues for CMRS providers as well.

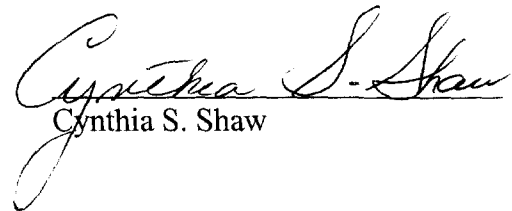
⁷ See *Price Cap Performance Review for Local Exchange Carriers, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262*, 12 FCC Rcd 16642 (1997) at ¶179 ("*Price Cap Fourth R&O*").

⁸ The Commission has previously upheld the Common Carrier Bureau as acting within its delegated authority in issuing "interpretations" of existing Commission rules and policies. See, e.g., *Southwestern Bell Telephone Company, Application for Review of Memorandum Opinion and Order Concerning Proper Treatment of Affiliate Transactions, Order on Review*, 12 FCC Rcd 2697 (1997) at ¶ 14.

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 22nd day of May, 1998, a copy of the foregoing "Comments" was sent by hand delivery to the following:

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Cynthia S. Shaw